STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals Docket No. 238079

KELLY-STEHNEY & ASSOCIATES, INC.,
A Michigan Corporation,

Plaintiff/Appellant,

Vs.

MACDONALD'S INDUSTRIAL PRODUCTS, INC.,
A Michigan Corporation,

Defendant/Appellee,
_____/

Supreme Court No. 123118

Court of Appeals
Docket No. 238079

Lower Court Case No. 00-028074-CK

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

MICHAEL J. O'SHAUGHNESSY (P 37229)
ERIC R. BOWDEN (P63118)
COLOMBO & COLOMBO
Attorneys for Appellant
P.O. Box 2028
Bloomfield Hills, Michigan 48303-2028
(248) 645-9300

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE**

COURT RULES

STATUTES

CONSTITUTION

SECONDARY SOURCES

STATEMENT OF JURISDICTION

This Court has jurisdiction over the Appellant's Appeal from the decision of the Court of Appeals pursuant to MCR 7.301(A) (2). The Order of the Circuit Court upon which this Appeal is based was entered on November 1, 2001.

STANDARD OF REVIEW

A motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim, is subject to *de novo* review. Smith v Globe Life Insurance Co., 460 Mich 446, 597 N.W.2d 28 (1999).

STATEMENT OF QUESTION PRESENTED

I. DID THE TRIAL COURT AN D COURT OF APPEALS ERR REVERSIBLY BY CONCLUDING THAT APPELLEE COULD INVOKE THE JUDICIALLY CREATED DOCTRINE OF EQUITABLE ESTOPPEL TO CIRCUMVENT ENFORCEMENT OF THE STATUTE OF FRAUDS WITH RESPECT TO AN UNDISPUTED ORAL AGREEMENT THAT BY ITS TERMS COULD NOT BE PERFORMED WITHIN ONE YEAR FROM THE MAKING OF THE AGREEMENT.

Trial Court Answered: No.
Court of Appeals reluctantly Answered: No.
Appellant Answers: Yes.
Appellee Answers: No.

STATEMENT OF FACTS

Until January, 2000, Appellant Kelly-Stehney & Associates, Inc. (hereinafter "Appellant") served as an independent sales representative for Appellee MacDonald's Industrial Products, Inc. (hereinafter "Appellee").

On February 23, 1994, the parties entered into a Manufacturers Representative Agreement, ("MRA") which provided that Appellant would work as an independent contractor/manufacturer's representative selling products to manufacturers in the automotive industry. (Appendix pp. 1a-2a). These products were manufactured by Appellee. Pursuant to the agreement between the parties, Appellee agreed to pay Appellant commissions at a rate of 3% on all production part sales procured by Appellant on behalf of Appellee. (Appendix pp. 1a-2a). The MRA specifically required that all modifications to the agreement be in writing and signed by both parties. (Appendix pp. 1a-2a).

Over the term of the contractual relationship, Appellant primarily procured business for Appellee with the Chrysler Corporation (now DaimlerChrysler). In 1998, Appellant procured a major program for Appellee with Chrysler which was referred to as the Chrysler DLO program. (Appendix pp. 12a-13a). This new program required Appellee to produce a part which surrounded the door window on Chrysler LH vehicles (Dodge Intrepid, Chrysler LHS, 300M and Concorde). Each vehicle produced would contain four of these parts. This new program was to continue from 1998 through the 2005 vehicle model year. The Chrysler DLO program alone generated over $87,000,000 in revenues for Appellee from 1998 to 2001. This combined with other programs procured by Appellant generated revenues in excess of $125,000,000 for the Appellee over the term of the parties' business relationship. At all relevant times, Appellant satisfied the requirements of the contractual relationship between the parties by procuring orders on behalf of Appellee and was

thereby entitled to 3% commissions in accordance with the parties' MRA.

Sometime in late 1999 or early 2000, DaimlerChrysler decided to drop Appellee as a supplier following the next model year. DaimlerChrysler cited low product quality as a factor in the termination of the relationship. On January 7, 2000, Appellee terminated the contractual relationship between the Appellant and Appellee in accordance with the terms set forth in the MRA as cited in the termination letter. (Appendix pg. 5a). Prior to and subsequent to the termination of the contractual relationship, Appellee failed and refused to pay Appellant the full amount of commissions owing on the sales it procured over a three year period, despite its requests and demands for same.

Appellant filed a Complaint in the Oakland County Circuit Court on December 14, 2000, alleging breach of contract, misrepresentation, conversion, unjust enrichment and violation of the Michigan Sales Representative Act arising out of Appellee's failure to pay 3% commissions in accordance with the MRA. Appellee answered that there were no commissions due because the parties entered into a "special agreement" with regard to the Chrysler DLO program. However, there is **no written modification** to the MRA signed by both parties. As such, it is Appellant's contention that Appellee failed to pay Appellant a 3% commission on the full piece price charged to Chrysler Corporation.

Instead, Appellee chose to pay a decreasing rate of commissions from the bargained for 3% rate to a lower 2% in 1999 and 1.5% in 2000 with a base price for parts of only $21.86. However, the true selling price for the parts ranged from $27.00 to $29.00. (Appendix pp. 18a-20a, Deposition pg. 61,66). More importantly, **a 3% commission rate was built into** the $27.00 to $29.00 piece price Appellee charged Chrysler Corporation. (Appendix pp. 14a-17a, Deposition pg. 70).

Therefore, the commissions owed to Appellant by Appellee essentially cost Appellee nothing. Appellee has failed to pay the full commissions due and owing on said parts for the model years 1998, 1999 and 2000 and pocketed the commissions at the expense of Appellant. As a result, Appellee has shorted Appellant's commissions by approximately $1,510,445.00.

Appellee filed a Motion for Summary Disposition pursuant to MCR 2.116 (C)(10) while Appellant requested Summary Disposition pursuant to 2.116(I)(2). A hearing on the Motions was held on October 17, 2001 and the Trial Court granted Appellee's Motion for Summary Disposition stating:

> I'm granting Defendant's motion for summary disposition, um, because the action is barred by the parties' subsequent oral agreement and I don't find that it is barred by the statute of frauds. The parties had a valid agreement for a reduced rate of commission and a reduced unit price, and Mr. Stehney very clearly testified that he had to accept it or Defendant was within its rights to terminate the relationship between the parties. Um, I think the Plaintiff is barred by equitable estoppel as well, and that's the decision.

(Appendix pp. 21a-22a). Subsequently, an Order Granting Appellee's Motion for Summary Disposition was entered by the Trial Court. Appellant then filed a timely Appeal as of Right with the Michigan Court of Appeals.

In a published opinion, Kelly-Stehney & Associates, Inc. v Macdonald's Industrial Products, Inc., 254 Mich. App. 608, 658 N.W. 2d 494 (2003), the Court of Appeals reluctantly affirmed the Trial Court in finding founding that the statute of frauds did not apply to the alleged oral DLO Agreement as the Appellant was equitably estopped from denying the validity of the agreement. Kelly-Stehney & Associates, Inc., at 614. It is from this Opinion that the Appellant takes this Appeal.

ARGUMENT

I. THE TRIAL COURT AND THE COURT OF APPEALS ERRED REVERSIBLY BY CONCLUDING THAT APPELLEE COULD INVOKE THE JUDICIALLY CREATED DOCTRINE OF EQUITABLE ESTOPPEL TO CIRCUMVENT ENFORCEMENT OF THE STATUTE OF FRAUDS WITH RESPECT TO AN UNDISPUTED ORAL AGREEMENT THAT BY ITS TERMS COULD NOT BE PERFORMED WITHIN 1 YEAR FROM THE MAKING OF THE AGREEMENT.

The Court of Appeals in its Opinion reluctantly affirmed the Trial Court and found that the Statute of Frauds did not apply to the alleged oral DLO Agreement as the Appellant was equitably estopped from denying the validity of the agreement. Kelly-Stehney & Associates, Inc., supra at 624. However, the Court of Appeals made it very clear that it was invoking the doctrine of equitable estoppel:

> ". . only because our Supreme Court has recognized that estoppel was developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds]' " Kelly-Stehney & Associates, Inc., at 614, quoting Opdyke Investment Co. v Norris Grain Co., 413 Mich 354, 365, 320 N.W.2d 836 (1982).

Further, the Court of Appeals went on to state:

> **We nonetheless question the wisdom of such judicially created exceptions to the statute of frauds as equitable estoppel** . . . Rather than deferring to the Legislature to address through the legislative amendment process any perceived inequity in the statute of frauds, Michigan courts have by judicial fiat created gaping holes in the statute of frauds which are inconsistent with the express language of the statute and the policy supporting it. . . (emphasis added)

Kelly-Stehney & Associates, Inc., at 614.

Notwithstanding the Court of Appeals reluctant decision, Appellant submits that it was impossible for the parties to modify the MRA by a three (3) year oral agreement as such an oral

agreement violates the Statute of Frauds. As discussed below, it is undisputed that the alleged "special agreement" for the DLO program was not in writing. In Reid v Bradstreet Company, 256 Mich 282, 286 , 239 N.W. 509(1931), this Court stated:.

> It is well established that a written contract may be varied by a subsequent parol agreement ***unless forbidden by the statute of frauds***, and that this rule obtains though the parties to the original contract stipulate therein that it is not to be changed except by agreement in writing. *Emphasis Added*

Reid, 256 Mich 282 at 286 (1931). Generally, where an original contract was required to be made in writing under the Statute of Frauds, any modification of the agreement should also be in writing. Zurcher v Herveat, 238 Mich App 267, 299-300, 605 N.W.2d 329 (1999). Consequently, a literal reading of the the Statute of Frauds and this Court's holding in Reid, makes the Appellant's alleged special oral agreement invalid. Morever, in Jefferson v. Kern, 219 Mich. 294, 298, 189 N.W. 195 (1922), this Court held that a contract that is **void under the statute of frauds** cannot be ratified because it is a nullity and therefore there is nothing to ratify.

The pertinent provision of the Statute of Frauds, MCL § 566.132(1)(a), states:

> Sec. 2. (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

A contract which cannot be performed within a year is within the Statute of Frauds, and therefore, is void unless in writing and signed by the party to be charged. Dumas v. Auto Club Ins. Ass'n, 437 Mich. 521, 540, 473 N.W.2d 652 (1991). It is undisputed that the alleged oral "special agreement"

was for a three (3) year term as evidenced by Appellee's Brief in Support of its Motion for Summary Disposition under MCR 2.116(C)(10) which stated at page 6:

> [w]hile MacDonald's did not agree to Kelly-Stehney's proposal, it was willing to forego its legal right to terminate the MRA as of February 1997, in exchange for a *three year extension* of the MRA and a "special agreement" on DLO commissions for MY 1998-2000 (the "DLO Agreement"). *Emphasis Added.*

Consequently, the alleged "special agreement" between the parties regarding the DLO program was squarely within the Statute of Frauds. However, the Appellee argued, and the Trial Court and the Court of Appeals incorrectly concluded that the Statute of Frauds does not apply to the oral DLO Agreement because the Appellant was equitably estopped from denying the validity of the oral DLO Agreement. Kelly-Stehney & Associates, Inc., at 614.

Appellant submits to this Court that the Trial Court and the Court of Appeals have erred reversibly in applying such a judicially created exception to the plain language of the Statute of Frauds. The Appellee at various points in the proceedings and in the Court of Appeals have cited Opdyke Investment Co. v Norris Grain Co., supra, where this Court recognized equitable estoppel as a doctrine, ". . . to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds]" Opdyke Investment Co., 413 Mich 354 at 365, 320 N.W.2d 836 (1982). Thus, under this holding, if a party can show that the elements of equitable estoppel have been satisfied, the Statute of Frauds will not apply to the oral agreement, despite the fact that the oral agreement does not satisfy the plain language of the statute.

Equitable estoppel may arise where (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny

the existence of those facts." Lakeside Oakland Dev., LC v. H & J Beef Co., 249 Mich.App. 517, 527, 644 N.W.2d 765 (2002), quoting Conagra, Inc. v. Farmers State Bank, 237 Mich.App. 109, 140-141, 602 N.W.2d 390 (1999). The Appellee argued and both the Trial Court and Court of Appeals erroneously concluded that the Appellant's conduct caused the Appellee to justifiably rely on its belief that Appellant accepted the terms of the alleged oral Special Agreement. However, where, as here, a party relies on a course of conduct to establish modification (of the DLO Agreement), "*mutual assent is less clear and not so evident.*" Quality Products and Concepts Co. v. Nagel Precision, Inc., 469 Mich 362, 372, 666 N.W.2d 251 (2003) (emphasis added). Thus, where a course of conduct is the alleged basis for modification, a waiver analysis is necessary. Id at 374.

Waiver is a voluntary and intentional abandonment of a known right. Id at 374,citing Roberts v. Mecosta Co. Hosp., 466 Mich. 57, 64 n. 4, 642 N.W.2d 663 (2002). Under the holding of Quality Products, affirmative conduct is required to show that a waiving party is intentionally and voluntarily relinquishing it rights under a contract. Quality Products at 371. The Appellee has argued that the Appellant acquiesced to the reduction in commission payments as well as a lower base price for the parts by cashing the commission checks, remaining silent and continuing to work for Appellee without protest.

However, the Appellant's conduct by no means rises to an intentional and voluntary waiver of its right to the full 3% commission rate that it was entitled to under the MRA. First, the Appellant sent a letter accompanied by a proposed extension to the MRA to the Appellee. (Appendix pp. 3a-4a). These documents, which speak for themselves, indicate that the Appellant would not be willing to offer, let alone accept, a reduction in the percentage rate of his commissions or a lower rate for the base price of the parts. Additionally, Appellee's Counsel drafted a Special

DLO Agreement which reduced the Appellant's commissions from 3% to 1.5% over the course of three (3) years, however the Appellant **never** signed the agreement. Logic dictates that if the Appellant was so agreeable to the reduction in its commissions, then it would have signed the Special DLO Agreement offered by the Appellee. Conversely, by not signing the Special DLO Agreement, the Appellant, by its conduct **affirmatively rejected** Appellee's reduction in the commissions.

Second, throughout this entire action, the Appellee has buttressed much of its case on the fact the Appellant cashed the reduced rate commission checks transmitted to it by the Appellee. However, Mr. Stehney testified that he accepted the reduced commission payments to help Appellee make it through a difficult financial period as it was transferring operations to a new facility, but that it was never his intent to be bound to permanently accepting the lower commission rates. (See Appellant's brief pg 21-22; Appendix pp. 6a-11a, pgs. 154-155). By accepting lower commission rates during an interim period, the Appellant provided the Appellee with more cash during the interim period to finance its move to a new facility. Thus, the mere cashing of these checks in this case does not rise to an intentional and voluntary waiver of his right to the full 3% of commissions under the MRA. Instead, the cashing of the checks in this case reflects only an accommodation of the needs of the Appellee.

Furthermore, the cashing of the checks during the interim period reflects at most a **deferrment** of full payment **not a relinquishment of his right** to the full 3% commission rate or the actual selling price on the parts. The Appellant cashed the commission checks under protest as the Appellee was fully aware that Appellant was not waiving his right to the 3% commission rate because Mr. Stehney testified that he had conversations regarding the deferment of the full payment of the 3% commission rate on the piece prices. (See Appellant's brief pg 15; Appendix

pp. 6a-11a, Deposition pgs. 148-150). This testimony, as discussed at length above, indicates that the Appellant voiced its concern over the reduced rates and revealed to the Appellee that the Appellant would be seeking and expecting full payment at a later date. Further, despite Appellee's belabored focus on the issue of cashing the checks, there is no testimony from the Appellant that he agreed to the reduced commission rates. The foregoing clearly indicates that there was no affirmative conduct upon which the Appellee could justifiably rely that Appellant accepted the terms of the alleged oral Special Agreement.

More importantly, in its published opinion in the instant matter, the Court of Appeals was very critical of the continued use of the judicially created doctrine of equitable estoppel to circumvent the plain language of the Statute of Frauds, but said that it would continue to do so until directed otherwise by the Michigan Supreme Court. The Court of Appeals stated:

> We question the continued viability of utilizing a judicially created doctrine like estoppel to circumvent the plain language of the statute of frauds. The Supreme Court's adoption of the estoppel exception to the statute of frauds in Opdyke appears to be based on the "absurd result" rule of statutory construction as described in Salas v Clements, 399 Mich 103, 109; 247 NW2d 889 (1976) ("[D]eparture from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question.") **However, our Supreme Court has recently refused to apply the absurd result rule of statutory construction, describing it as " `nothing but an invitation to judicial lawmaking.' "** People *v* McIntire, 461 Mich 147, 156 n 2; 599 NW2d 102 (1999), quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21. **Thus, the viability of the estoppel exception to the statute of frauds is questionable** in light of the Supreme Court's recent unwillingness to apply the absurd result rule of statutory construction. (*Emphasis added*)

Kelly-Stehney & Associates, Inc., at 615, fn. 4. Appellant maintains it is time for this Court to reassess the viability of the estoppel exception to the Statute of Frauds and do away with the

estoppel exception to the Statute of Frauds, consistent with this Court's prior ruling in People v McIntire, supra, which refused to apply the absurd result rule of statutory construction described in Salas v Clements, supra.

In Salas v Clements, supra, the plaintiffs sued the defendant, a tavern owner, under the Michigan Dram Shop Act, after the plaintiffs were assaulted by an allegedly intoxicated person in the defendant's tavern. The plaintiffs could not identify the person who assaulted them and therefore, did not name the unknown party in the lawsuit. The defendant tavern owner filed a Motion for Summary Disposition arguing that the plaintiffs had not complied with the Dram Shop Act provision that, "no action against a retailer . . . shall be commenced unless the . . . alleged intoxicated person is a named defendant in the action and is retained in the action until the litigation is concluded by trial or settlement". The plaintiffs in Salas did not name and retain the alleged intoxicated person in the action. Based upon the requirement of the statute and the fact that the plaintiffs had not named the alleged intoxicated person, the trial court granted the defendant's Motion for Summary Disposition. In reversing, this Court stated:

> In determining whether plaintiffs in this case are barred from suing under the Dram Shop Act, we must keep in mind the fundamental rule of statutory construction that departure from the literal construction of a statute is justified when such construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the act in question.

Salas, 399 Mich 103 at 109. On this basis, this Court held that the "name and retain" requirement of the Dram Shop Act only applied to those injured plaintiffs who knew the identity of the alleged intoxicated person. This method of crafting a so-called "just result" despite the literal construction of statutes came to be known as the "absurd result" rule of statutory construction. Opdyke Investment Co. v Norris Grain Co., supra.

As stated by the Court of Appeals in its opinion in the instant matter, the "absurd result" rule has been used by this Court in Opdyke Investment Co. v Norris Grain Co., supra, to recognize equitable estoppel as a doctrine, ". . . to avoid the arbitrary and unjust results required by an overly mechanistic application of the [statute of frauds]". In the instant matter, the Trial Court, applying an equitable estoppel theory enforced the oral DLO Agreement, despite the fact that the oral DLO Agreement does not satisfy the plain language of the Statute of Frauds. The Court of Appeals reluctantly did the same.

However, as the Court of Appeals noted, this Court has recently refused to apply the "absurd result" rule in circumstances much more serious than those in the case at bar describing the "absurd result" rule as "`nothing but an invitation to judicial lawmaking.' " People *v* McIntire, 461 Mich 147, 156 n 2; 599 NW2d 102 (1999), quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21.

As stated above, in People v McIntire, supra, this Court re-examined the use of the so-called "absurd result" rule. In McIntyre, in exchange for testimony before a grand jury, the defendant was granted immunity from prosecution in 1983 for a then unsolved 1982 homicide. When the prosecuting attorney later concluded that the defendant was the killer, he charged the defendant with murder and possession of a firearm during the commission of a felony. The prosecutor argued that the grant of immunity was void because the defendant had failed to give truthful testimony to the one-man grand jury. The Circuit Court disagreed and dismissed the charges. The Court of Appeals reversed and ordered the charges reinstated. This Court reversed the judgment of the Court of Appeals and reinstated the judgment of the Circuit Court. In its opinion, this Court emphatically

stated:

> A fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case. . . These traditional principles of statutory construction thus force courts to respect the constitutional role of the Legislature as a policy-making branch of government and constrain the judiciary from encroaching on this dedicated sphere of constitutional responsibility. Any other nontextual approach to statutory construction will necessarily invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences.

McIntire, 461 Mich 147 at 152-153 (citations omitted). This Court then examined the statute regarding granting immunity to a witness compelled to testify before a one-man grand jury, MCL § 767.6, to determine whether the statute conditioned the grant of immunity upon truthful testimony. This Court determined that the statute contained no such requirement and further stated:

> The [Court of Appeals] majority, having concluded or conceded that 'at least some portion of defendant's testimony 'may have tended to incriminate' him,' , should have, under the plain language of the statute and application of traditional rules of statutory construction, affirmed the trial court's dismissal of the murder and felony- firearm charges. Instead, the [Court of Appeals] majority ... enacts by judicial ukase a new statute requiring truthful testimony as a condition precedent to a grant of transactional immunity. The [Court of Appeals] acknowledges that 'there is no express requirement that the immunized individual 'answer' questions truthfully.'

McIntire, 461 Mich 147 at 155 (citations omitted). This Court then went on to discuss the application of the "absurd result" rule and stated:

> . . .in order to justify its action in looking beyond the text to determine legislative intent, the [Court of Appeals] majority embarks on an "absurd result" analysis in which the [Court] focuses not on what the Legislature said through the text of the statute, but what the [Court] believes the Legislature must really have meant despite the language it used. . .Therefore, in order to avoid what it believes would be an 'illogical' result, the [Court of Appeals] majority expends a great deal of interpretive justification to "infer" a legislative intent. . .

McIntire, 461 Mich 147 at 156-157. Finally, this Court refused to invoke the "absurd result" rule and concluded:

> It cannot be gainsaid that if the Legislature intended that immunity be forfeited completely upon the giving of false testimony, it could easily have said so. However, the Legislature did not, and [we] believe that the [Court of Appeals] majority mistakenly reads that condition into the statute to further policy concerns that the [Court], but apparently not the Legislature, prefers. Because [we are] unable to reconcile the [Court of Appeals] analysis with traditional rules of statutory construction and what [we] believe is a proper reading of M.C.L. § 767.6; MSA 28.946, [we disagree with the Court of Appeals majority's] conclusion that defendant may be tried for murder and felony-firearm.

McIntire, 461 Mich 147 at 160. This Court refused to adopt the "absurd result" rule even though it meant that in all likelihood an alleged murderer would not be tried for the crime.

Similar to the statute in McIntire, the Statute of Frauds contains no exception to enforcement if the elements of equitable estoppel are present. Had the legislature intended this interpretation, it clearly would have put language to this effect in the statute itself. For instance, the Legislature could have provided language in MCL 566.132 Sec. 2. (1) (a) similar to the following:

> Sec. 2. (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement, *unless one of the contracting parties undertakes affirmative conduct which evidences its assent to be bound to an oral agreement whose terms are to be effective beyond 1 year.*[1]

However, the legislature has not included such language in the Statue of Frauds, and it remains clear and unambiguous on its face.

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[1] Italicized text suggests proposed language to the Statute of Frauds to address oral agreements, such as the one at issue in the case.

This Court in McIntire further indicated that:

> A fundamental principle of statutory construction is that a clear and unambiguous statute leaves no room for judicial construction or interpretation. When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; **the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case.**"

McIntire, 461 Mich 147 at 152-153 (Emphasis added). As in McIntire, the statute at issue here is clear and there is no reason to stray from its plain language and add the exceptions that the Appellee, the Trial Court, and, reluctantly, the Court of Appeals have read into the statute. Further, this Court has held that there is no place for judicial interpretation, i.e. the "absurd result" rule, when a statute is clear and unambiguous as to do so would ". . . invite judicial speculation regarding the probable, but unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences". McIntire, 461 Mich 147 at 153.

Further, in Lovely v. Dierkes, 132 Mich.App. 485, 489, 347 N.W.2d 752 (1984), the Court of Appeals addressed the issue of whether promissory estoppel, a cousin to the doctrine of equitable estoppel, barred the application of the statute of frauds. Specifically, Lovely involved an oral promise for three years employment; the Michigan Court of Appeals held that "where it would be inequitable to apply the statute of frauds," the common law claim of promissory estoppel can bar application of the statute of frauds. Id. at 489, 347 N.W.2d 752. However, the Michigan Court of Appeals, later, questioned the continued viability of Lovely on the basis that principles of separation of powers preclude a court from overriding the policy choices of the legislature. Crown Technology Park v. D & N Bank, FSB, 242 Mich.App. 538, 548 n. 4, 619 N.W.2d 66 (2000). Specifically, in Crown, the Court of Appeals revealed that:

> "promissory estoppel is a judicially created doctrine that was developed as an equitable remedy applicable in common-law contract actions. Unlike a traditional common-law contract claim or defense, **the statute of frauds is legislatively mandated**. The Michigan Legislature has determined that, for those contracts specifically identified in the statute of frauds, it is important to provide certainty and to avoid controversy over the terms of alleged contracts. Thus, such contracts must be reduced to writing. Given this premise, **the role of the judiciary is to apply the statute of frauds as written, without second-guessing the wisdom of the Legislature.** In Lovely, this Court, by finding that a claim of promissory estoppel can preclude the application of the statute of frauds, essentially found that judicial policy balancing can override the policy choices of the Legislature. Such a conclusion is contrary to well-founded principles of statutory construction and is inconsistent with traditional notions of the separation of powers between the judicial and legislative branches of government. See Scalia, A Matter of Interpretation: Federal Courts and the Law (New Jersey: Princeton University Press, 1997), pp. 14-29." (Emphasis added)

What the Appellee asks this Court to do is simply ignore the language of the statute and substitute its own policy preferences for those of the Legislature by finding an unexpressed legislative intent. Instead, the Appellant maintains that this Court must focus on what the Legislature said through the text of the statute, not what the Court believes the Legislature must really have meant, despite the language in the statute. If this Court is willing to uphold these ideals of statutory construction when what is at stake is the prosecution of an alleged murderer as in McIntire, then surely this Court should uphold these same ideals when what is at stake is simply contract interpretation.

Finally, the Appellee has argued that by way of the Constitution, the common law doctrine of equitable estoppel is on equal footing with the statute of frauds, and both sources of law must be construed in harmony to the extent possible. This argument carries little weight in light of the fact that Michigan courts presume that the Legislature is aware of the common law that legislation will affect when legislation is passed; therefore, **if the express language of the legislation [i.e. the statue of frauds] conflicts with the common law [i.e. doctrine of equitable estoppel], the**

unambiguous language of the statute must control. Auten v. Unemployment Compensation Comm., 310 Mich. 453, 17 N.W.2d 249 (1945); Gallie v. Detroit Auto Accessory Co., 224 Mich. 703, 195 N.W. 667 (1923); Bennett v. Weitz, 220 Mich.App. 295, 299, 559 N.W.2d 354 (1996); Barker Bros. Constr. v. Bureau of Safety & Regulation, 212 Mich.App. 132, 140, 536 N.W.2d 845 (1995). Further, if there is a conflict between the common law and a statutory provision, the common law must yield. Pulver v. Dundee Cement Co., 445 Mich. 68, 75, ft nt. 8, 515 N.W.2d 728 Mich.,1994; (see also Boyer v. Backus, 282 Mich. 701, 704, 280 N.W. 756. Mich.,1938, where it was stated that the common law does not remain in force where it appears that the common-law rule has been changed by statute). The foregoing decisions clearly indicate that in the case at bar the doctrine of equitable estoppel must give way to the legislated form of the Statute of Frauds.

In addition, this Court is not without authority to change the status of the common law and its relationship to Michigan's codified version of the Statute of Frauds. Specifically, in Michigan, the common law prevails **except as abrogated** by the Constitution, the Legislature, **or this Court**. Mich. Const.1963, art. 3, § 7; People v. Aaron, 409 Mich. 672, 722-723, 299 N.W.2d 304 (1980); People v. Duffield, 387 Mich. 300, 308, 197 N.W.2d 25 (1972). Morever, it is for this Court to decide whether a common-law rule shall be retained unless the legislature states a rule that is inconsistent with or precludes a change in the common-law rule. Gruskin v. Fisher, 405 Mich. 51, 66, 273 N.W.2d 893 (1979). To this end, because the Legislature **has never codified the doctrine of equitable estoppel**, this Court has the authority to dispel any notion that the a judicially created doctrine can trump the language promulgated by the Legislature and the Appellant, through this Appeal, request such relief.

II. THE COURT'S RULING IN THIS MATTER SHOULD HAVE RETROACTIVE APPLICATION.

It is well settled that judicial decisions are applied retroactively. Lincoln v. Gen. Motors Corp., 461 Mich. 483, 491, 607 N.W.2d 73 (2000). Only where a decision is "unexpected" or "indefensible" in light of the law existing at the time that the underlying facts developed is there a question about whether to afford the decision complete retroactivity. MEEMIC v. Morris, 460 Mich. 180, 195, 596 N.W.2d 142 (1999).

It can hardly be said that a decision regarding whether the doctrine of equitable estoppel is an exception to the language of the Statute of Frauds is "unexpected" or "indefensible." The Statute of Frauds was adopted by the Legislature 150 years ago, and courts, in this time, have had numerous occasions to deliberate over cases that discuss the relationship between the common law and the Statute of Frauds. Practitioners of law in the state of Michigan will hardly be shocked to learn that the plain language of a statute trumps judicially created caveats to statutory law that do nothing more than muddy the waters of Michigan jurisprudence.

Morever, this case does not present the type of first-impression question that supports prospective application. In Jahner v. Dep't of Corrections, 197 Mich.App. 111, 495 N.W.2d 168 (1992) the Court of Appeals reasoned:

> "The fact that a decision may involve an issue of first impression does not in and of itself justify giving it prospective application where the decision does not announce a new rule of law or change existing law, but merely gives an interpretation that has not previously been the subject of an appellate court decision." Id. 114

By finding that the judicially created doctrine of equitable estoppel is not an exception to the Statute of Frauds, this Court is not "announcing a new rule of law or changing existing law", it is simply

applying the plain language of a statute as articulated by the legislature. To Appellant's knowledge, no Court has ever formally addressed why the doctrine of equitable estoppel is an exception to the Statute of Frauds and specifically MCL 566.132 Sec. 2. (1) (a). Indeed, while courts in Michigan have recognized the doctrine of equitable estoppel, none have ever articulated why it is appropriate to stray so far from the language of the Statute of Frauds as codified in MCL 566.132 Sec. 2. (1) (a). Thus, by reviewing the interplay between equitable estoppel and the Statute of Frauds, this Court would simply be providing an interpretation of this interplay which has not previously been the subject of any appellate court decisions.

RELIEF REQUESTED

Based on the foregoing Appellant hereby request that this Honorable Court reverse the Trial Court's grant of Summary Disposition in favor of the Appellee and the Court of Appeal's decision to affirm the Trial Court and grant Summary Disposition in favor of the Appellant and remand this case for a hearing on the Appellant's damages.

Respectfully Submitted,

COLOMBO AND COLOMBO

BY: _____

MICHAEL J. O'SHAUGHNESSY (P37229)
ERIC R. BOWDEN (P63118)
Attorney for Appellant
P.O. Box 2028
Bloomfield Hills, Michigan 48303-2028
(248) 645-9300

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